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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROLANDO PUENTE, Defendant and Appellant.	D040560 (Super. Ct. No. SCD160313)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Rolando Puente appeals a judgment following his jury conviction of one count of stalking (Pen. Code, § 646.9, subd. (a)).[1] He contends: (1) he was denied effective assistance of counsel based on various acts and omissions by his counsel; (2) the trial court erred in instructing on other crimes evidence; and (3) the prosecutor committed prejudicial misconduct in closing argument.

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1 All statutory references are to the Penal Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

Brenda Willcoxson was a bartender at LJ's bar in Lemon Grove. During the summer of 2000 she met Puente when he became a regular customer at LJ's. In October Puente smashed a glass beer mug against customer Larry Early's face after Early repeatedly asked Puente to move away from the pool table at which Early was playing. Puente was ejected from LJ's and told not to return. Willcoxson heard about the incident later that evening.

Puente telephoned Willcoxson at her home expressing his wish to explain the Early incident. She told him not to call her at home again. However, Puente continued to call her at home with increasing frequency. Puente mistakenly believed he had a romantic relationship with Willcoxson. He asked her why she did not love him and to "give him another chance." She told him he was delusional and they never had and never would have a relationship. Willcoxson told him not to call her again. Sometimes she would not answer her telephone when it rang. At other times she would hang up when she learned it was Puente calling. Puente also left frightening messages on her answering machine.

Puente also called Willcoxson at LJ's during her shift. He also continued to frequent LJ's. When she asked him to leave LJ's, he yelled obscenities and stated: "You don't have to be a bitch, but I just want to talk to you, I love you. Why don't you love me? Can you give me another chance?" He also told her: "If I can't have you, no one can." After he was ejected from LJ's, he stood across the street and yelled obscenities at Willcoxson and LJ's customers.

In December and January, Puente sent two letters to Jackie Barrios, Willcoxson's best friend. Willcoxson read his letters, in which he stated: "Fuck with me, and I fuck back;" "Once I beat this charge, it's on to payback time;" "I get a stiffy every time I think of [Willcoxson] in lingerie;" "Tell [Willcoxson] she better be waiting for me when I get out, or I'll find someone else to rub it in her face for all the hell she put me through. She owes me big;" "But if [Willcoxson] never loved me, or even had feelings for me, then you can stick a fork in her because she's done;" and "I'll know what to do about her."

On Valentine's Day, Puente telephoned Willcoxson and told her he had tried to deliver some expensive gifts for her at LJ's and was angry she was not there to receive them. She told him she did not want the gifts and to stop calling her and frequenting LJ's.

Willcoxson told Puente to stop calling her or she would call the police. He continued to call her and on February 28 Willcoxson filed a report with the Sheriff's Department. By that time, Puente had called her between 50 and 100 times. She played for the deputy some of the messages Puente left on her answering machine. In one message he told her she was in trouble and he was mad because she was trying to turn people against him.

On April 5 James Tozier, Willcoxson's friend, met Puente at the trolley station and told him to leave Willcoxson alone because he was "scaring the hell" out of her. Puente pulled out a closed knife, but put it away on Tozier's request. Tozier told Willcoxson about the incident. Puente repeatedly called her at home that night.

On April 11 Puente followed Willcoxson to Dirk's, a bar near LJ's, sat at the end of the bar, and stared at her. A couple of days later, Puente approached her at Dirk's and

angrily asked her why she did not love him. Other customers at Dirk's had to escort Puente out.

On April 13 Tozier answered one of Puente's calls to Willcoxson. Tozier accepted Puente's challenge to fight him at Grover's bar. During the fight, Tozier told Puente to leave Willcoxson alone. Puente bit Tozier and said he did not know what he was talking about. When Sheriff's deputies arrived, only Puente was there. Puente was angry and "in the officer's face." He told the deputies that Tozier may have gone to LJ's. When deputies arrived at LJ's, Early told them he wanted Puente charged for the beer mug incident six months earlier. After Early identified Puente at Grover's bar, Deputy Trinidad Tejeda arrested Puente. Willcoxson also identified Puente and filed another report regarding his conduct toward her. The following day, Puente repeatedly called Willcoxson's home.

On April 28 one of Willcoxson's friends called her and told her Puente broke his ex-wife's jaw outside LJ's. Puente was at LJ's looking for Willcoxson.

Puente mailed Willcoxson an envelope containing various letters, poems or song lyrics, and court documents, with certain language highlighted. The letters included the following statements: "What you did was trigger the street-wise [mentality] in me. Fuck with me and I fuck back. [¶] . . . [¶] I just ain't going to let anybody play me, and if you try, you're going to pay;" "I hope she understands that there is only so much that a person will tolerate before they strike back;" "You vindictive little bitch;" "You can tell me that I was never more than a customer to you. That's just another nail in the coffin;" "You've no doubt heard that I busted my ex-wife's jaw in front of LJ's. As much as that is an

entertaining thought, it never happened;" "I told the dude about my Mongel Associate brother. The one you met, who had some friends who were cigarette burn experts;" "You aren't the first woman to put me through this. Lisa Fetty from Fanny's, God bless her soul, couldn't manipulate me either. I told her to treat me right or shit's going to happen;" "Can you really blame me for wanting to spit in your face?" "I want to flirt, I want to shake my ass for you. I want to kiss you, I want to seduce you, I want to pick you up and throw you on a bed. I want to spend the rest of my life with you. [¶] One time you wore a black slitted dress that drove me wild. It gave me a really hard time;" "I'm just not a good person to fuck with;" telling her she had one week to get back to him; and "As for me, one way or another in a week there'll be no turning back." Puente signed the letters: "Love you always."

The poems or song lyrics had the following language highlighted: "She crawls to his doorstep alone and bleeding;" "She paid the price when they found her dead. She simply ignored what her momma said;" "It wouldn't be long until they face the facts. He buried the hatchet in the twilight zone, and then you'll pay the price when they find you dead."

Afraid that her life was in danger, Willcoxson took the writings to the Sheriff's Department the following day. Puente was arrested. Searching Puente's home, deputies found copies of the letters and other documents Puente mailed to Willcoxson and some yellow highlighters. Because of fear for her life, Willcoxson changed her locks on a weekly basis and was escorted home from work.

An information charged Puente with one count of stalking (§ 646.9, subd. (a)).

At trial Willcoxson and other witnesses testified regarding Puente's conduct. In his defense, Puente presented the testimonies of other witnesses who gave somewhat different accounts of the Early and Tozier incidents. Puente's son testified that an unnamed woman called Puente's home and angrily asked for him. When told he was not home, she hung up. Puente's mother testified that an unnamed woman called Puente's home, stating that he would be in a lot of trouble. A defense investigator testified that Willcoxson admitted calling Puente's home once.

The parties stipulated that at the time of the charged offense Puente was on felony probation for having four convictions for driving under the influence of alcohol within seven years.

The jury found Puente guilty of stalking (§ 646.9, subd. (a)). At sentencing, the trial court imposed a three-year term.

Puente timely filed a notice of appeal.

DISCUSSION

I

Counsel's Failure to Object to Deputy Tejeda's Testimony

Puente contends he was denied effective assistance of counsel when his counsel did not object to certain testimony by Deputy Tejeda.

A

Tejeda testified that after she arrested Puente for the Early incident, Puente was agitated and called her "a lot of bad things." While at a hospital for treatment of Puente's injuries, because of Puente's embarrassing statements Tejeda asked the nurse for a

separate room in which they could wait. When the prosecutor asked Tejeda what those embarrassing statements were, she answered: "[Puente] was just calling me hook nose, lesbian, dyke, saying I arrested him because I was attracted to [Willcoxson] and it was bad. [¶] He's probably the [worst] person that I've ever had to deal with." The trial court sustained a relevancy objection by Puente's counsel to the question regarding how many persons Tejeda had arrested during her 10-year career. However, Puente's counsel did not object to Tejeda's testimony that she had arrested "a lot" of people. The prosecutor also asked Tejeda about portions of Puente's letters to Willcoxson that referred to Tejeda and some of the derogatory statements he made to Tejeda. Although the trial court sustained an objection by Puente's counsel to a question about Willcoxson's demeanor during her interview with Tejeda, Tejeda continued to answer that Willcoxson appeared angry and scared and did not know what else to do. Puente's counsel did not request that Tejeda's answer be stricken.

On cross-examination, Puente's counsel elicited testimony from Tejeda that Puente was upset after being arrested because he had been handcuffed for several hours. In reply to a question whether she called Puente "stinky," Tejeda stated she could not recall making that comment, but added she did not understand why Puente was so hateful toward someone he did not know and that "he was also abusive to a security guard that walked in [to the room]." The trial court denied Puente's counsel's request to strike her answer as nonresponsive. Tejeda admitted she was pretty upset and may have told Puente he was stinky.

On redirect examination, the prosecutor followed up on Tejeda's testimony that Puente was abusive to the security guard. Tejeda stated that the guard was a black male. When the guard entered the room, Puente asked him: "What you doing in here, you fucking nigger?"

B

In making a claim of ineffective assistance of counsel, a defendant has the burden on appeal to prove by a preponderance of the evidence that: (1) his or her counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) defendant suffered prejudice from that deficient performance, i.e., it is reasonably probable that he or she would have received a more favorable outcome had counsel's performance not been deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Osband* (1996) 13 Cal.4th 622, 700; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) If a defendant does not show the required prejudice, an appellate court need not address the remaining issue of whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. (*Hill v. Lockhart* (1985) 474 U.S. 52, 60 ["We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the . . . requirement of 'prejudice.' "]; *In re Resendiz* (2001) 25 Cal.4th 230, 239, 248-254; *People v. Kipp* (1998) 18 Cal.4th 349, 367; *People v. Davis* (1995) 10 Cal.4th 463, 516; *People v. Wash* (1993) 6 Cal.4th 215, 271; *In re Alvernaz* (1992) 2 Cal.4th 924, 934.) Furthermore, if counsel's

act or omission is not explained in the record, the ineffective assistance claim is more appropriately addressed in a habeas corpus proceeding unless counsel was asked for an explanation and failed to provide one or unless there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *Osband*, *supra*, at pp. 700-701; *People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

C

We need not address the issue of whether Puente's counsel performed deficiently by not objecting to the prosecutor's questions of Tejeda or not requesting that her answers be stricken because Puente has not carried his burden on appeal to show that his counsel's purported errors were prejudicial to him. Assuming arguendo, as Puente argues, that Tejeda's testimony was improper character evidence that tended to portray him as a homophobe, a racist, and a mean person, the evidence in support of the jury's finding that Puente was guilty of stalking Willcoxson is overwhelming. To commit the offense of stalking, a defendant must "willfully, maliciously, and repeatedly [follow] or willfully and maliciously [harass] another person and . . . [make] a credible threat with the intent to place that person in reasonable fear for his or her safety . . . ." (§ 646.9, subd. (a); *People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) The "credible threat" must be "made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety . . . ." (§ 646.9, subd. (g).)[2] The record

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2 Section 646.9, subdivision (g) provides: "For the purposes of this section, 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct,

shows that Puente repeatedly contacted Willcoxson in person and by telephone and made various express or implied threats against her. Considering Puente's entire course of conduct toward Willcoxson, the evidence overwhelmingly shows he "willfully and maliciously harass[ed] [Willcoxson] and . . . [made] a credible threat with the intent to place [her] in reasonable fear for . . . her safety." (§ 646.9, subd. (a).) Furthermore, based on Puente's conduct in the Early incident, the Tozier incident, breaking his ex-wife's jaw, and angrily confronting Willcoxson and others, there is overwhelming evidence that Puente's threats were "made with the apparent ability to carry out the threat[s] so as to cause [Willcoxson] to reasonably fear for . . . her safety." (§ 646.9, subd. (g).) We also note Puente's conduct is similar to, but substantially more egregious, than the defendant's conduct in *People v. Halgren* (1996) 52 Cal.App.4th 1223, in which we concluded there was sufficient evidence to support the defendant's stalking conviction.[3] (*Id*. at p. 1233.) Although Tejeda's testimony may have characterized

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made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. . . . Constitutionally protected activity is not included within the meaning of 'credible threat.' "

3 In *Halgren*, we stated: "Halgren repeatedly telephoned [the victim], insisting she speak with him after she had clearly explained she was not interested. He left a message on her home telephone and demanded she talk with him there. He told her she would be sorry she had been so rude. He appeared at her office when she was not there, positioning himself where he could watch people leave the building. On the day he was arrested he told her she would pay for her rudeness and he would 'fix her' or 'fix this.' These statements were a credible threat with a clear intent to place her in fear for her safety. Coupled with the repeated harassing telephone calls, they constitute substantial

Puente as a homophobe, a racist, and a mean person, any prejudicial effect from that characterization could not have caused the jury to convict him of stalking on the record in this case. Because Puente does not show he would have received a more favorable verdict had his counsel objected to, and the trial court excluded, Tejeda's testimony, he has not carried his burden on appeal to show he was prejudiced by his counsel's purported deficient performance. Accordingly, we do not address whether Puente's counsel's performance was deficient and conclude Puente was not denied effective assistance of counsel. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60; *In re Resendiz*, *supra*, 25 Cal.4th at pp. 239, 248-254; *People v. Kipp*, *supra*, 18 Cal.4th at p. 367; *People v. Davis*, *supra*, 10 Cal.4th at p. 516; *People v. Wash*, *supra*, 6 Cal.4th at p. 271; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 934.)

II

Counsel's Failure to Object to Fetty's Testimony

Puente contends he was denied effective assistance of counsel when his counsel did not object to the testimony of Lisha Fetty.

A

Fetty testified that she met Puente in 1997 when she was a bartender at Fanny's cocktail lounge. She invited a group of people, including Puente, to the opening of a friend's bar. After that event, Puente began acting strangely and stated he thought the

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evidence which support his conviction of felony stalking." (*People v. Halgren*, *supra*, 52 Cal.App.4th at p. 1223.)

event was a date with Fetty. Fetty told him it was not a date. She told him he was not her boyfriend and had no intention to date him or anyone else at Fanny's.

About six months later, Puente went along on a group camping trip of Fanny's employees, including Fetty, and its customers. Early one morning, Puente came to Fetty's tent and told her he wanted to lay down and talk to her. Fetty told him to leave her tent.

The trial court sustained foundation and hearsay objections by Puente's counsel to the prosecutor's questions of Fetty regarding Puente's conduct and statements. At a sidebar conference, the prosecutor argued that she was offering evidence of Puente's conduct regarding Fetty as prior crimes evidence under Evidence Code section 1101, subdivision (b) to show Puente stalked Fetty in a manner similar to his alleged stalking of Willcoxson. Puente's counsel argued:

> "Mr. Puente is being prosecuted not for anything regarding this particular witness. Her only relevance that I can see becomes what's in the letter.
>
> "The [Evidence Code section] 1101(b) notion that it is being offered for what, for identity, for intent, for what particular purpose? Is it being offered -- we haven't really heard that this is [Evidence Code section] 1101(b), showing his character for being a stalker.
>
> "What relevance does it have under [Evidence Code section] 1101?"

The prosecutor replied, "It is offered to show common modus operandi and motive. [¶] . . . [¶] So, I think it's relevant to show that [Puente] has this tendency to presume a relationship when there isn't [one]. [Puente's counsel is] going to be challenging [Willcoxson's] credibility on that." The trial court ruled it would exercise its discretion

under Evidence Code section 352 to exclude evidence of Fetty's interpretation of what others told her Puente was saying regarding his purported relationship with Fetty. However, the court also ruled it would allow the prosecutor to lay a foundation for Fetty's testimony regarding what she heard.

In the jury's presence, the prosecutor continued her direct examination of Fetty without objection by Puente's counsel. Fetty stated that because Puente caused problems with some of the customers and because of his treatment of her, he was barred from Fanny's. Puente argued with Cindy, one of Fetty's friends, insisting Fetty was his girlfriend. After Puente was barred from Fanny's, he continued to attempt to enter it and called there asking for Fetty. Because Fetty was concerned for her safety, she began taking different routes home so Puente could not follow her. He also sent about four to six letters to Fetty at Fanny's. In those letters Puente told Fetty how much he loved her and included poems and his drawings of her.

In 1998 Fetty left Fanny's and began working for CalTrans. Fetty picked up probationers and transported them to sites where they would pick up litter or pull weeds. Puente approached her during one of her pickups, but Fetty told him to stay away from her van and that she could not talk with him. Puente made an obscene gesture toward her and then left. Fetty continued to receive letters from Puente until about two months before the instant trial.

On cross-examination, Fetty admitted Puente never physically threatened her.

B

We need not address the issue of whether Puente's counsel performed deficiently by not objecting to Fetty's testimony because Puente has not carried his burden on appeal to show that his counsel's purported errors were prejudicial to him. Assuming arguendo, as Puente argues, that Fetty's testimony was improper character evidence under Evidence Code section 1101, subdivision (a), the evidence in support of the jury's finding that Puente was guilty of stalking Willcoxson is overwhelming. Although Fetty's testimony may have supported an improper inference that Puente has a propensity to commit stalking offenses, any prejudicial effect from that inference could not have caused the jury to convict him of stalking on the record in this case. In particular, we note Puente's conduct toward Fetty was not as egregious as his conduct toward Willcoxson. He did not physically threaten or harm Fetty or her friends. Contrary to Puente's assertion, it is highly unlikely the jury convicted him of stalking Willcoxson in order to punish him for stalking Fetty. Rather, on this record it is clear the jury convicted him because of his conduct toward Willcoxson. Because Puente does not show he would have received a more favorable verdict had his counsel objected to, and the trial court excluded, Fetty's testimony, he has not carried his burden on appeal to show he was prejudiced by his counsel's purported deficient performance. Accordingly, we do not address whether Puente's counsel's performance was deficient and conclude Puente was not denied effective assistance of counsel. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60; *In re Resendiz*, *supra*, 25 Cal.4th at pp. 239, 248-254; *People v. Kipp*, *supra*, 18 Cal.4th at

p. 367; *People v. Davis*, *supra*, 10 Cal.4th at p. 516; *People v. Wash*, *supra*, 6 Cal.4th at p. 271; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 934.)[4]

III

Counsel's Stipulation

Puente contends he was denied effective assistance of counsel when his counsel stipulated to the fact that Puente had four convictions for driving under the influence of alcohol within seven years.

A

During trial, testimony and other evidence was admitted that referred to Puente's parole, probation, and incarceration. For instance, one of Puente's telephone messages to Willcoxson referred to his parole officer. Fetty referred to Puente's incarceration.

Apparently to reduce the prejudicial effect of those references, Puente's counsel agreed to a stipulation that Puente was on probation for a felony conviction. Furthermore, he made the tactical decision to specify that Puente's probation was for four

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4 In any event, we doubt Puente could show his counsel's performance was deficient. Even had his counsel objected to Fetty's testimony, it is likely the trial court would have admitted evidence of Puente's prior acts regarding Fetty under Evidence Code section 1101, subdivision (b) as "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [defendant's] disposition to commit such an act." Because Puente's conduct toward Fetty was quite similar to his conduct toward Willcoxson, the court could have reasonably concluded it was sufficiently similar so as to be admissible to support the inference Puente harbored the same intent in both cases, thereby supporting a finding of Puente's intent "to place [Willcoxson] in reasonable fear for . . . her safety." (§ 646.9, subd. (a); *People v. Catlin* (2001) 26 Cal.4th 81, 111; *People v. Kipp, supra,* 18 Cal.4th at pp. 369-371; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. McCray* (1997) 58 Cal.App.4th 159, 172.) It is unlikely we would have concluded the trial court abused its discretion had it admitted Fetty's testimony on that ground.

convictions for driving under the influence within seven years. Accordingly, the trial court instructed the jury:

> "The stipulation [between the parties] is that at the time of these allegations, Mr. Puente was on probation for felony driving under the influence of alcohol, after sustaining four driving under the influence of alcohol convictions during a seven-year period of time."

Puente's counsel confirmed that was the stipulation he wished to enter on his client's behalf.

B

Because Puente's counsel apparently made a tactical decision in agreeing to the stipulation and his reasons for that decision are not made clear on the record, Puente's claim of ineffective assistance of counsel for that decision is more appropriately raised in a habeas corpus proceeding. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267; *People v. Osband*, *supra*, 13 Cal.4th at pp. 700-701; *People v. Diaz*, *supra*, 3 Cal.4th at pp. 557-558.) Puente's counsel *could* have made a tactical decision to agree to the stipulation to reduce the prejudicial effect of references to his probation, parole, and incarceration. He *could* have reasonably believed that specifying that his probation was for convictions for driving under the influence of alcohol would avoid speculation by jurors that he had been on parole or that he had committed a violent felony or a felony more egregious than driving under the influence. Those reasons could constitute satisfactory explanations for his tactical decisions. However, the record does not contain any, much less a complete, explanation by Puente's counsel for his tactical decisions

regarding the stipulation. Therefore, we decline to address the issue of ineffective assistance of counsel on appeal.[5]

In any event, assuming arguendo Puente's counsel performed deficiently by agreeing to the stipulation, we again conclude Puente has not carried his burden on appeal to show he was prejudiced by that stipulation. The evidence in support of the jury's finding that Puente was guilty of stalking Willcoxson is overwhelming. In comparison, any prejudicial effect from the stipulation was likely to have been insignificant and could not have caused the jury to convict him of stalking on the record in this case. Because Puente does not show he would have received a more favorable verdict had his counsel not agreed to the stipulation, he has not carried his burden on appeal to show he was prejudiced by his counsel's purported deficient performance. Accordingly, we do not address whether Puente's counsel's performance was deficient and conclude Puente was not denied effective assistance of counsel. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60; *In re Resendiz*, *supra*, 25 Cal.4th at pp. 239, 248-254; *People v. Kipp*, *supra*, 18 Cal.4th at p. 367; *People v. Davis*, *supra*, 10 Cal.4th at p. 516; *People v. Wash*, *supra*, 6 Cal.4th at p. 271; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 934.)

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[5] To the extent Puente argues his counsel should have moved to exclude the references to his probation, parole, and incarceration rather than agreeing to the stipulation, that argument also is more appropriately raised in a habeas corpus proceeding because his counsel may have made reasonable tactical decisions not reflected in the record on appeal. Similarly, Puente's counsel's failure to request a limiting instruction regarding the jury's consideration of this evidence could reflect a tactical decision and is more appropriately addressed in a habeas corpus proceeding.

IV

Instructions on Evidence of Other Crimes

Puente contends the trial court erred in instructing on evidence of other crimes because its instructions did not set forth the applicable burden of proof required to establish the other crimes.

A

The trial court instructed on consideration of evidence of other crimes with a modified version of CALJIC No. 2.50:

> "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.
>
> "This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character, or that he has a disposition to commit crimes. It may be considered by [you only] for the limited purpose of determining if it tends to show: [¶] [a] characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent, which is a necessary element of the crime charged.
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> "For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> "You are not permitted to consider such evidence for any other purpose."[6]

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6 The written version of this instruction included the following language at the beginning of the second paragraph: "Except as you will otherwise be instructed."

However, the trial court did *not* instruct with CALJIC Nos. 2.50.1 and 2.50.2 on the applicable burden of proof to establish the other crimes.[7] CALJIC No. 2.50.1 instructs:

> "Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] . . . other than [that] [those] for which [he] [she] is on trial.
>
> "You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that [a] [the] defendant committed the other [crime[s]] . . . .
>
> "[If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged [or any included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.]" (CALJIC No. 2.50.1 (7th ed. 2003).)

CALJIC No. 2.50.2 instructs:

> " 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> "You should consider all of the evidence bearing upon every issue regardless of who produced it." (CALJIC No. 2.50.2 (7th ed. 2003.)

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7 Although Puente did not object to the trial court's omission of CALJIC Nos. 2.50.1 and 2.50.2, he may raise the issue on appeal because the court's instructions affected his substantial rights. (§ 1259; *People v. Carpenter* (1997) 15 Cal.4th 312, 381.) However, to the extent Puente contends the trial court should have modified CALJIC No. 2.50 to specifically instruct that it must find Puente had the required specific intent in stalking Fetty (i.e., the other crime), he waived that contention by not requesting modification or clarification. In any event, because the trial court instructed with CALJIC No. 9.16.1 on the elements of the offense of stalking, the jury presumably applied those requirements to any determination that Puente stalked Fetty.

In electing not to give CALJIC Nos. 2.50.1 and 2.50.2, the trial court explained to counsel:

> "I have, in the past, utilized the approach of if we do get into evidence of other crimes, which [the prosecutor has] offered, that in order to avoid the confusion that I think exists because of the case law as to the preponderance of evidence standard, I just give it all beyond a reasonable doubt. [¶] . . . [¶] . . . [T]he way the case law is, the . . . way the instructions are, it tends to be, I'm going to say, messy. [¶] I have found it to be cleaner and easier for the jury, subject to criticism [from] the court of [appeal]. It's just the evidence of other crimes has the same burden as everything else, which is beyond a reasonable doubt, so that we don't even get the preponderance of evidence instruction. [¶] That's been my approach in the past."

Following the jury's verdict finding him guilty of stalking, Puente filed a motion for new trial arguing, inter alia, that the trial court erred by not instructing with CALJIC Nos. 2.50.1 and 2.50.2 because the jury was left without any guidance on the applicable burden of proof regarding other crimes. The trial court denied the new trial motion, stating:

> "I did use [CALJIC No.] 2.50, I just didn't use the preponderance of the evidence instruction[s], which would have been a lesser burden on the People for the [Evidence Code section] 1101 aspects of the testimony.
>
> "As I stated at that time, and I still feel, I can remember the case that came out recently. That hasn't changed my mind in any way, and that is it is very difficult for a jury, I think, to distinguish between what has to be proved by a preponderance of the evidence, and then as you're going to use it as circumstantial evidence to support an element that has to be proved beyond a reasonable doubt.
>
> "I think it's better just to say beyond a reasonable doubt for everything. I believe that's how it all came out in the end and was the way I instructed.

> "To separate out giving the instruction as [Puente's counsel] has suggested actually tends to highlight [that] other [Evidence Code section] 1101 -- [¶] . . . [¶] -- evidence, but I think tactically there were some reasons why that would not be advantageous. [¶] . . . [¶] I think it's the most logical approach for jurors, especially when you do have lots of [Evidence Code section] 1101 evidence, which is exactly the opposite of [Puente's counsel's] argument.
>
> "If I'm wrong, I really would like for the court to be able to tell me.
>
> "It isn't that I'm trying to shift the burden, although I understand when I do that, I don't see a way that we can accurately, without [undue] pitfalls, instruct the jury as to the distinction.
>
> "As a lawyer, I think we're real comfortable with it making good sense to us, but to explain it to a layperson, it's one of those areas where we're waiting.
>
> "Until I see a good instruction, I'll switch back. So far, I haven't come up with one, I haven't seen one."

B

"It is settled law that during the guilt trial evidence of other crimes may be proved by a preponderance of the evidence . . . ." (*People v. McClellan* (1969) 71 Cal.2d 793, 804.) In *People v. Carpenter*, *supra*, 15 Cal.4th 312, the Supreme Court rejected the contention that the higher clear and convincing burden of proof should apply. (*Id*. at p. 382.) *Carpenter* stated: "[W]e adhere to the preponderance standard and disapprove any language suggesting the clear and convincing evidence standard. The preponderance of the evidence standard adequately protects defendants. . . . If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered." (*Ibid*.) Accordingly, if evidence of other crimes is admitted under Evidence Code section 1101, trial courts should instruct

that the preponderance of the evidence standard of proof applies to proof those other crimes were committed. (*Ibid*.; *People v. Simon* (1986) 184 Cal.App.3d 125, 134.)

C

In omitting CALJIC Nos. 2.50.1 and 2.50.2, the trial court apparently assumed the jurors would infer the reasonable doubt standard of proof in CALJIC No. 2.90 would apply to proof of other crimes. CALJIC No. 2.90, as given by the trial court, instructed:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: it is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

As Puente notes, CALJIC No. 2.90's reasonable doubt burden of proof expressly applies to determinations of a defendant's guilt of the charged offense and not to determinations whether the defendant committed other crimes (e.g., stalked Fetty). Although, as the trial court assumed, the jurors may have inferred that burden of proof also applied to proof of other crimes committed by Puente, that inference was not the only one jurors could have drawn. It is possible the jurors were uncertain regarding the applicable standard of proof or unaware that a particular standard of proof should apply. Because of those possibilities and because the preponderance of the evidence, rather than reasonable doubt, burden of proof applies to determinations of other crimes, we cannot approve the trial

court's instructions in this case. When evidence of other crimes is admitted, CALJIC Nos. 2.50, 2.50.1, and 2.50.2 should be given unless appropriate alternative instructions are given setting forth the substance of those standard instructions. Although the standard instructions allow for the possibility of juror confusion as the trial court noted, omission of CALJIC Nos. 2.50.1 and 2.50.2 and reliance on CALJIC No. 2.90 is not a proper means to avoid that possibility. As Puente notes, that alternative means of instructing the jury also allows for ambiguity and confusion regarding the applicable standard of proof because CALJIC No. 2.90 does not expressly apply to establishing the existence of other crimes. Furthermore, CALJIC No. 2.90's reasonable doubt standard is not the proper standard for proof of other crimes; preponderance of the evidence is the proper burden of proof. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 382; *People v. McClellan*, *supra*, 71 Cal.2d at p. 804.)

D

Although the trial court did not properly instruct on other crimes evidence, we nevertheless conclude its error was harmless. We do not believe there was a reasonable likelihood the jury understood or misapplied the instructions as Puente asserts. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) "In making this determination, we [consider] the specific language challenged, the instructions as a whole and the jury's findings." (*Cain*, *supra*, at p. 36.) The jury was instructed to consider the instructions as a whole. (CALJIC No. 1.01.) The trial court's modified version of CALJIC No. 2.50 instructed on other crimes evidence: "For the limited purposes for which you may consider such evidence, *you must weigh it in the same*

manner as you do all other evidence in the case." (Italics added.) Because there were no other instructions on the manner of weighing evidence, the jury likely referred to CALJIC No. 2.90 for guidance and, as the trial court assumed, probably applied the reasonable doubt standard of proof to its consideration of evidence of other crimes. Contrary to Puente's assertion, it is not reasonably probable the jury determined Puente committed other crimes (e.g., stalked Fetty) applying a burden of proof lesser than the preponderance of the evidence standard. Therefore, considering the instructions as a whole, the trial court did not instruct on an erroneously lower standard of proof for other crimes than required under *People v. Carpenter*, *supra*, 15 Cal.4th at page 382.

In any event, any instructional error was harmless whether judged under the standard of *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818.[8] Considering the instructions as a whole, it is likely the jury applied a higher, not a lower, standard of proof for determination of other crimes than the appropriate preponderance of the evidence standard. Puente could not have been prejudiced by application of a higher burden of proof. (Cf. *People v. Gallego* (1990) 52 Cal.3d 115, 183; *People v. Cox* (1990) 221 Cal.App.3d 980, 985, fn. 2.) Furthermore, to the extent jurors possibly applied a lower standard of proof to determination of Puente's other crimes, it is not reasonably possible the jury's verdict could have been affected by

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8 In analogous cases involving CALJIC Nos. 2.50.01 and 2.50.02, courts have not uniformly applied either standard in determining whether instructional errors were prejudicial. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 37-38 [noting split of authority]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1101-1102 [applying *Chapman* standard]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334-1337 [applying *Watson* standard].)

that lower standard. The evidence of Puente's prior crimes involved possible stalking of Fetty. Puente's conduct toward Fetty was less egregious than his conduct toward Willcoxson. Therefore, it is unlikely the jury would convict Puente for stalking Fetty rather than for the instant charge of stalking Willcoxson. The prosecutor did not argue Puente should be convicted of the instant charge based on other crimes. Furthermore, the trial court instructed on the elements of the offense of stalking and the reasonable doubt standard of proof for finding Puente guilty of that charge. Finally, the evidence that Puente stalked Willcoxson is overwhelming. Therefore, any findings the jury may have made regarding his conduct against Fetty (or other evidence of other crimes) based on an improper (i.e., lower) standard of proof were "unimportant in relation to everything else the jury considered on the issue" of Puente's guilt on the instant charge of stalking Willcoxson. (*Yates v. Evatt* (1991) 500 U.S. 391, 403-404, disapproved on another ground in *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73, fn. 4.) Accordingly, we conclude any instructional error regarding other crimes evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)[9]

V

Prosecutor's Closing Argument

Puente contends the prosecutor committed prejudicial misconduct during her closing argument.

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9 Based on the same reasoning, we similarly conclude it is not reasonably probable Puente would have received a more favorable verdict had the trial court properly instructed with CALJIC Nos. 2.50.1 and 2.50.2. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

A

In closing argument the prosecutor referred to the movie *Cape Fear* in explaining how certain conduct, including laughing, can be considered harassment. She stated in part: "Robert De Niro is the bad guy, and he was convicted and sent off to prison for rape. He gets out. He's mad at Nick Nolte. He was his attorney. And he starts to stalk him." Puente's counsel did not object to this reference or request an admonition.

The prosecutor later referred to Puente's alleged verbal threats, stating: "So, I mean, it's just a part of our culture. We hear about these things. Guys obsessed. They don't want anybody else to have their woman. And what happens? Bad stuff." The trial court sustained the objection by Puente's counsel to this argument. However, Puente's counsel did not request an admonition.

In arguing the existence of the required intent, the prosecutor referred to another case, stating: "There was a case, just by way of example, that happened somewhere in the Midwest where a man was pursuing a woman in a similar way, pursuing her romantically. She was saying, no, no, no, no. [¶] He pursued, pursued. Finally he broke into her home, and he raped her." Puente's counsel objected and moved for a mistrial. The trial court sustained the objection, but denied the motion for a mistrial. The prosecutor continued her argument: "An explanation is in a situation like that, yes, I raped her, but the reason was because he knew that once she made love with me --." Puente's counsel objected. The trial court advised the jury: "Ladies and gentlemen, as I understand the [prosecutor's] argument, this is presented as a hypothetical explanation of the issue [of] intent. With that understanding, I'm going to overrule the objection, and

deny the motion." The prosecutor then continued her argument to which Puente's counsel did not object: "Thank you. It's absolutely a hypothetical. [¶] The explanation is yes, I raped her, but I did it because I knew that once she made love to me, she'd know how good I was and she'd love me forever. [¶] The underlying intent was to gain her love. That was his goal. But his method of doing it was to rape her. That doesn't mean he's not guilty of the rape. [¶] Even assuming that the defendant's underlying goal was to pursue her, and to gain her love, his method of doing it was to stalk her. He may not have physically raped her, but he mind raped her to accomplish his goal. [¶] He mind raped her, he stalked her, and if maybe his sick purpose is to gain her love, it doesn't mean he's not guilty of the stalking . . . ."

Following the jury's verdict, the trial court denied Puente's motion for new trial based on the prosecutor's closing argument, as set forth *ante*.

B

Because Puente did not object to the prosecutor's reference to *Cape Fear*, he waived any purported prosecutorial misconduct based on that reference. "[W]hen an objection and admonishment would have cured any potential harm, the claim [of prosecutorial misconduct] has been waived for purposes of appeal." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1141; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 801; *People v. Price* (1991) 1 Cal.4th 324, 447 ["To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct."].) Any alleged harm arising out of the *Cape*

Fear reference would have been curable by an admonition. That reference was not so unduly inflammatory that a court admonition to disregard it would not have been followed by the jury. Therefore, Puente waived any prosecutorial misconduct arising out the *Cape Fear* reference.

Although Puente's counsel objected to the prosecutor's reference to "bad stuff" happening, he did not request an admonition. Any alleged harm arising out of the reference to "bad stuff" happening would have been curable by an admonition. That reference was not so unduly inflammatory that a court admonition to disregard it would not have been followed by the jury. Therefore, Puente also waived any prosecutorial misconduct arising out of that reference. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1141; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 801; *People v. Price*, *supra*, 1 Cal.4th at p. 447.)

Although Puente's counsel objected to the first part of the prosecutor's reference to a Midwest case, he did not request an admonition. Rather, he moved for a mistrial. The trial court sustained the objection, but denied the motion for mistrial. Any alleged harm arising out of that reference to the Midwest case would have been curable by an admonition. It was not so unduly inflammatory that a court admonition to disregard it would not have been followed by the jury. Because Puente did not request an admonition, he waived any prosecutorial misconduct arising out of that initial reference to the Midwest case. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1141; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 801; *People v. Price*, *supra*, 1 Cal.4th at p. 447.)

The prosecutor continued her argument: "An explanation is *in a situation like that*, yes, I raped her, but the reason was because he knew that once she made love with me --." (Italics added.) Overruling an objection by Puente's counsel, the trial court explained to the jury that the prosecutor's argument referred to a *hypothetical* case involving the issue of intent. By so limiting the prosecutor's argument, the trial court properly cured any prejudicial effect that may have been caused by reference to an actual case. Furthermore, prosecutors may use hypothetical examples to explain the issue of intent. (Cf. *People v. Davis, supra,* 10 Cal.4th at p. 538 ["[T]here was no impropriety in the prosecutor's use of hypothetical examples to show that there are varying degrees of culpability . . . ."]; *People v. Barnett, supra,* 17 Cal.4th at p. 1141.) The prosecutor did not argue or suggest that Puente raped his victim as the defendant did in the hypothetical case. Contrary to Puente's assertion, no reasonable juror would have misunderstood the prosecutor's hypothetical as referring to facts in his case or as argument by the prosecutor that he should be convicted of stalking to prevent him from raping Willcoxson or others in the future. (*Davis*, *supra*, at p. 538.) Accordingly, there was no prosecutorial misconduct.

After the trial court's explanation of the prosecutor's argument, the prosecutor then confirmed it was a hypothetical case and compared it to the facts of this case, arguing: "[Puente] may not have physically raped her, but he mind raped her to accomplish his goal. [¶] He mind raped her, he stalked her, and if maybe his sick purpose is to gain her love, it doesn't mean he's not guilty of the stalking . . . ." However, Puente's counsel did not object to this continued argument by the prosecutor or request an admonition. Any

alleged harm arising out of the prosecutor's continued argument, including reference to Puente's "mind rape" of Willcoxson, would have been curable by an admonition. That reference was not so unduly inflammatory that a court admonition to disregard it would not have been followed by the jury. Because Puente did not object or request an admonition, he waived any prosecutorial misconduct arising out of that reference and the prosecutor's continued argument. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1141; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 801; *People v. Price*, *supra*, 1 Cal.4th at p. 447.)[10]

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.

10 Assuming arguendo Puente's counsel objected to the purported instances of misconduct and requested admonitions, Puente does not show they constituted prosecutorial misconduct or, if so, that it is reasonably probable he would have received a more favorable verdict had there been no misconduct. (*People v. Welch* (1999) 20 Cal.4th 701, 752-753; *People v. Dennis* (1998) 17 Cal.4th 468, 521-522; *People v. Turner* (1994) 8 Cal.4th 137, 193-194.) Furthermore, Puente does not persuade us that he did not waive any purported misconduct because timely objections and requests for curative admonitions by his counsel would have been futile. (*People v. Noguera* (1992) 4 Cal.4th 599, 638.)